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Supreme Court, U. S.
FILED
AUG 28 1975
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In The

# Supreme Court of the United States

October Term, 1975

No. 75-45

CLIFTON C. TANG, and
AFFY INDUSTRIES, INC., *Petitioners,*

vs.

WILLIAM E. CRAVER, JR., HOPE D. CRAVER, THOMAS L. HARVEY, JEREMIAH B. DUFFY, CRAVER INDUSTRIES, INC., and CRAVALUME, INC., *Respondents.*

*On Petition For a Writ Of Certiorari To*
*The United States Court Of Appeals*
*For The Third Circuit*

## REPLY MEMORANDUM

Clifton C. Tang,
228 E. Clinton Avenue,
Tenafly, N.J. 07670

*Counsel for Petitioners*

## REPLY

This Petion follows the dismissal of the underlying appeal, 74-1685, which was taken from final orders entered in *1974* as specified in the Notice of Appeal (App. 1j). With this knowledge, respondents ***misrepresented*** the dismissed appeal as taken *"from the judgment entered July 2, 1973."* (Resp. Brief, "Question Presented") Docket entries (App. 1a-2a) show that two separate appeals were taken from the *1973* judgment, to wit: 73-1905 (AFFY) and 73-1936 (TANG). These two appeals have never been "consolidated" with each other or with 74-1685. With this knowledge, respondents ***misrepresented:*** *"the Court of Appeals expressly found that the (consolidated) appeal was not timely."* (Resp. Brief, p.3) In fact, however, no such *express finding* was ever made with respect to 73-1905 and 73-1936. Furthermore, docket entries show that these 1973 appeals were timely filed in accordance with Judge Augelli's extension order (App. 2p, *infra*) and the 14-day provision of F.R.A.P Rule 4 (App. 1m).

Judge Augelli made the aforesaid order in the (vacationing) trial judge's stead and he was at the time assisted by the trial judge's law clerk. (App. 5g) Judge Augelli knew then the action of the trial judge and the clerk partaking in the District Court Notice (App. 1n, *infra*) issued 9 days after judgment entry and 5 days after plaintiffs timely served and filed the Notice of Motion to amend findings. (App. 1a) The 9th day Court Notice regulated the submissions and hearing dates for the motion. It proximately caused plaintiffs' not filing notice of appeal within 30 days of judgment entry in order not to interfere with the court-regulated motion. Under circumstances recited in plaintiffs' protective motion, Judge Augelli made the order extending appeal time. (App. 1p-2p, *infra*) The order is valid pursuant to (a) discretionary power vested by current related Federal Rules cited at pages 2 and 6 of the Petition *sub judice* and (b) the reason articulated in the 8th Circuit *Fairway* case cited at page 8 of the Petition.

Before *Fairway* was reported, however, Judge Biunno decided

(App. 3e-4e) that Judge Augelli's order was "void," citing the 3rd Circuit *Plant* case.

On broad institutional basis, this Petition seeks this Court's (a) review of district judges' discretionary powers under current F.R.A.P Rule 4 in *pari materia* with F.R. Civ.P. Rule 78 and (b) resolution of the *Fairway-Plant* conflict — thereby vindicating Judge Augelli's extension order. It follows that jurisdiction over 73-1905 and 73-1936 remain *vested ab initio* in the court of appeals, not destroyed by Judge Biunno's voiding Judge Augelli's valid order. In view of *vested* appellate jurisdiction, Judge Biunno's other error [1] become moot and need not be dealt with on this Petition.

Respectfully submitted,

Clifton C. Tang,
228 E. Clinton Avenue
Tenafly, N.J. 07670

*Counsel for Petitioners*

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(1) For example, Judge Biunno, denied the motion for inclusion of Judge Augelli's 1973 knowledge in "findings" (App. 1f, part 3 and App. 1h, last para.) Judge Biunno elided the 9th day Court Notice in causing plaintiffs' deference thereto (i.e. not filing appeal while court regulated motion was pending) as distinguished from compliance therewith (i.e. submission on due date).

(2) Respondents' statement of the case lacked candor. For example, in this action for their fraud in franchising, they knew the forum law that tort claims were not assignable and therefore, not assigned; they knew that petitioners sued for rescission also. Their argument was made as if the 9th day Court Notice and Judge Augelli's order never took place.

Appendix N Facsimile of District Court Notice issued on the 9th day after judgment entry.
(R-111 Exh. H; USCAR-2 p.A-20)
Cross reference: Petition p.3.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N. J.

Date July 11, 1973

To: Clifton C. Tang, Esq.
228 E. Clinton Av.,
Tenafly, N.J. 07670
Re: Clifton C. Tang, et al vs William E. Cfaver, Jr., etal
Civil 530-67

Your motion returnable August 13 1973, before Judge Garth has been received and filed.

A. It will not be placed on the motion calendar for that date because of your failure to comply with Local Rule 12 of this Court in the following respects:

_____ No affidavit of mailing or acknowledgment of service;

_____ Papers not filed in the Clerk's Office 20 days prior to the return date;

_____ Motion not accompanied either by brief or by statement that brief is unnecessary and the reasons therefor;

__X__ The designated return day is not an argument day

B. In view of this default

__X__ Your motion will be placed on the calendar for September 10th 1973.

_____ After curing the default, it will be necessary for you to serve and file a notice of a new hearing date which may not be less than 20 days after the service of such notice.

Any departure from this disposition requires the Judge's approval.

Very truly yours,

Angelo V. Locascio
Clerk

cc: Leonard B. Sussholz, Esq.
Plaintiffs' submissions due July 20th; defendant's submissions due August 3rd.

**Appendix P Facsimile of the Motion and Order extending appeal time**
**(R-81; USCAR-2 p.A-46, A-22)**
**Cross reference: Appendix B.**

FILED

AUG 13 1973
AT 9:45 A.M.
ANGELO W. LOCASCIO
Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CLIFTON C. TANG, and AFFY INDUSTRIES, INC., Plaintiffs,

v.

WILLIAM E. CRAVER, JR., et al., Defendants.

Civil Action
No. 530-67

MOTION FOR LEAVE TO FILE NOTICE OF APPEAL WITHIN EXTENSION OF TIME

Pursuant to General Rule 12A of this Court, counsel for plaintiffs hereby applies to the court for leave to file notice of appeal within the extension of time authorized by Rule 4(a) of the Federal Rules of Appellate Procedure. This motion is necessitated by the following sequence of events.

1. After entry of judgment on July 2, 1973, counsel for plaintiffs filed and served a Notice of Motion to amend findings and judgment, the next day.

2. On July 11th, by notice, the court directed that the motion be scheduled for hearing on September 10, 1973 and that plaintiffs' submissions are due July 20th; defendants' submissions due August 3rd.

3. Counsel for plaintiffs filed and served papers designated "Motion" and "Plaintiff's Motion Brief" on July 20th.

4. Counsel for defendants, ex parte, secured an extension until August 10th to file and serve his submissions.

5. In their Answering Brief, defendants argued that plaintiff's July 20th submissions were "untimely" and therefore the court lacks jurisdiction even to consider the motion.

6. An untimely motion to amend does not stop the running of the time for filing a notice of appeal.

7. Counsel for plaintiffs knows of no controlling case precedent which is dispositive of the "timeliness" issue raised by the defendants on the facts of this case one way or the other.

8. As scheduled, the court will reach the "timeliness" issue only after plaintiff's motion is actually made (see General Rule 12C of this Court) on September 10, 1973.

9. Pursuant to F.R.A.P. Rule 4(a), upon a showing of excusable neglect, the court may extend the time for filing a notice of appeal to August 31, 1973 only and not beyond.

10. Thus, by reason of counsel's reliance upon the July 20th due date specified by the court, plaintiff's substantive right to appeal is in danger of expiration under defendants' belated attack on timeliness grounds undermining the jurisdiction of this court "even to consider the motion".

Therefore, counsel for plaintiffs must expeditiously move the court for permission to file a notice of appeal on or before August 31, 1973.

Dated: August 13, 1973

Clifton C. Tang
CLIFTON C. TANG,
Attorney for Plaintiffs.

Time to file notice of appeal in this matter is hereby extended to August 31, 1973

Motion granted for plaintiffs as above stated.

Dated: August 13, 1973.

Anthony T Augelli
~~Edward J. Gurfein~~, U. S. D. J.